COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1490

DAVID M. HARPER

vs.

NORTH LANCASTER, LLC.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

North Lancaster, LLC (North Lancaster), appeals from a Superior Court judge's order denying its motion to strike an agreement for judgment, filed by David M. Harper, arising from a default provision of a settlement agreement. We affirm.

Background. Seeking to resolve a breach of contract action brought against North Lancaster by Harper, a member of North Lancaster, the parties entered into a settlement agreement, executed on April 6, 2018, requiring North Lancaster to pay Harper $550,000 in two installments by dates specified in the agreement. The agreement further provided that, in the event North Lancaster defaulted on the payments, Harper could file a jointly-executed agreement for judgment, to be held in escrow by Harper's counsel, in the amount of $679,388, less any payments made. While North Lancaster paid Harper $200,000 by the first

date specified in the agreement, it failed to make the second payment of $350,000. Accordingly, Harper filed the agreement for judgment. North Lancaster moved to strike the filing, claiming that (1) it was not in default of the settlement agreement because it was unable to make a timely payment due to matters beyond its control, and (2) the agreement for judgment was an unenforceable liquidated damages provision. A Superior Court judge denied the motion without issuing written findings. North Lancaster timely appealed.

Discussion. We review the judge's order denying North Lancaster's motion de novo. See Commonwealth v. Tremblay, 480 Mass. 645, 646 (2018). North Lancaster argued that its failure to satisfy the second payment was excused under § 4.ii of the settlement agreement, stating that "[i]t shall not be considered a failure to satisfy a payment obligation . . . if North Lancaster is unable to make timely payment due to matters beyond its control, such as an Act of God, Force Majeure, or similar." North Lancaster identified the "matter" beyond its control as the refusal of Harper's brother, Stephen Harper, to vacate property North Lancaster owned and was in the process of selling. North Lancaster contended that without the proceeds from the sale, it could not satisfy its payment obligations under the settlement agreement, and the buyer refused to close

the sale until Stephen vacated the property. We are not persuaded.

"[A]n agreement for judgment is a separate and valid contract whereby the parties make a 'free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment.'" Kelton Corp. v. County of Worcester, 426 Mass. 355, 359-360 (1997), quoting Thibbitts v. Crowley, 405 Mass. 222, 227 (1989). Thus, "any exceptions made by either party to the underlying actions are extinguished unless specifically noted in the judgment or otherwise incorporated into the judgment." Id. at 360.

North Lancaster's payment obligations were not contingent on any condition precedent. While North Lancaster claimed that Harper was fully aware of its "financial constraints" and its intent to satisfy the second payment from proceeds from the sale of the property, it did not include the prospective sale or otherwise incorporate any kind of financial constraint into the settlement agreement. This omission is especially striking given that the dispute with Stephen predated the settlement, and the closing on the property was to occur after the execution of the settlement agreement. Accordingly, we conclude that the absence of any such contingency in the settlement agreement or the agreement for judgment "fairly reflected the parties' intentions." Kelton Corp., 426 Mass. at 360 (holding that

defendant's payment obligation for services provided by plaintiff was not contingent on availability of funds from special account because such limitation was not included in parties' settlement agreements or agreement for judgment). Nor did North Lancaster's financial constraints, including the complications with the sale due to Stephen's refusal to vacate the property, meet the contemplated criteria to excuse performance as set forth in the agreement as an "Act of God, Force Majeure, or similar," given that such circumstances cannot be construed as unforeseeable, unanticipated, or uncontrollable.

Turning to whether the agreement for judgment constituted a penalty and thus an unenforceable liquidated damages provision, we note that "[i]t has long been the rule in Massachusetts that a contract provision that clearly and reasonably establishes liquidated damages should be enforced, so long as it is not so disproportionate to anticipated damages as to constitute a penalty." TAL Fin. Corp. v. CSC Consulting, Inc., 446 Mass. 422, 431 (2006). Given that Harper originally sought in excess of $800,000 in damages in the underlying action -- and that he held a real estate attachment for $704,441 against North Lancaster as security for his claims -- the reduced sum reflected the judgment as agreed to by the parties in their settlement agreement. The additional $129,388 added to the settlement amount of $550,000, is still less than what Harper

claimed was his actual damages. Where damages are ascertainable, such a provision would need to be "grossly disproportionate to actual damages[] or unconscionably excessive" to be rendered unenforceable. NPS, LLC v. Minihane, 451 Mass. 417, 420 (2008). Neither gross disproportion nor unconscionable excessiveness was present here. With all reasonable doubts resolved in Harper's favor as the aggrieved party, see id., we find that North Lancaster has failed to meet its burden of persuading us that the agreement for judgment was an unenforceable penalty.

Order denying motion to strike agreement for judgment affirmed.

By the Court (Sullivan, Massing & Lemire, JJ.[1]),

Joseph F. Stanton

Clerk

Entered: July 3, 2019.

[1] The panelists are listed in order of seniority.